DATE: April 28, 1995

CASE NO.: 94-INA-00059

In the Matter of:

FARBELL ELECTRONICS,
Employer

On Behalf of:

ROSA SUZETE MUSSOI,
Alien

Appearance: Susan Schaier, Esq.
For the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 19, 1992, Farbell Electronics ("Employer") filed an application for labor certification to enable Rosa Suzete Mussoi ("Alien") to fill the position of Exporter (AF 4). The job duties for the position are:

> All aspects of marketing of small electronics, especially telecommunications products, to foreign customers; involves determining their requirements, negotiating terms, feasibility of customizing orders, assessing customers' credit worthiness. Making initial contacts abroad. Working with foreign suppliers of materials, components used in manufacturing, to arrange terms, supply schedules; both export and import functions requiring familiarity with engineering aspects of products traded.

The requirements for the position are a Bachelor of Arts or Science Degree in Business and two years of experience in the job offered.

The CO issued a Notice of Findings on April 6, 1993 (AF 43), proposing to deny certification on the grounds that the Employer has not adequately documented why it is not feasible to train a U.S. worker, and whether the Alien had the required experience at the time of hire, pursuant to § 656.21(b)(5).

Specifically, the CO found that if the Employer chooses to reduce his requirements, he must document amendments to be made on the application and willingness to readvertise. In addition, the CO found that if the Employer chooses to document why it is not now feasible to train a U.S. worker, it must document:

(1) How many wholesalers were employed at the time the Alien was trained;
(2) How many wholesalers are now employed in addition to the Alien;
(3) Who trained the Alien;
(4) The change in total work force and annual volume of business from the time the Alien was hired and trained until present; and,

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

(5) Why a company that has expanded considerably since the Alien was trained has not proportionately developed the ability to train now, as is customary with growth and development.

Accordingly, the Employer was notified that it had until May 11, 1993, to rebut the findings or to cure the defects noted.

In its rebuttal, dated April 14, 1993 (AF 56), the Employer submitted a letter through Counsel contending that the Alien was hired initially because of her extensive exporting and marketing background. The Employer further contended that: the Alien is the only person in a company of seven employees carrying out her duties; she was trained by, and reports to, the Technical Marketing Specialist; and, two employees have recently left, there is a growing volume of pending orders, and the additional burden of having to train someone else would be a serious handicap.

The CO issued the Final Determination on May 7, 1993 (AF 59), denying certification because the Employer did not adequately document that the job requirements are the actual minimum requirements pursuant to § 656.21(b)(5), by showing the Alien had the required experience at her time of hire. The CO additionally found that the Employer did not provide specific documentation as requested concerning the annual volume of business from the time the Alien was hired and trained, or why the company has not developed the ability to train proportionally with its growth.

On June 1, 1993, the Employer requested reconsideration of the Denial of Labor Certification (AF 69). The CO denied reconsideration on June 22, 1993, and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien: the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF, Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990). An employer violates § 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991); *Rosiello Dental Laboratory*, 88-INA-104 (Dec. 22, 1988); *MMMats, Inc.*, 87-INA-540 (Nov. 24, 1987).

Labor certification is properly denied under § 656.21(b)(5) where the alien does not possess all of the job requirements, thus evidencing that the job was not listed at its actual minimum requirements. *Valley Beth-Shalom School*, 91-INA-382 (Dec. 28, 1992). If the employer demonstrates that the alien qualifies for the position based solely on her experience gained with another entity, but also has experience with the employer, the experience with the employer does not violate § 656.21(b)(5). *William Lawrence Camps, Inc.*, 90-INA-248 (June 24, 1991).

Actual Minimum Requirements:

Here, the Employer stated in rebuttal that the Alien was hired because of her "extensive and impressive export and marketing background gained in working for several large Brazilian manufacturing companies" (AF 56). After the CO had issued the final determination denying labor certification, the Employer submitted, as part of its request for reconsideration, a letter from one of the Alien's former employers, Grendene, S.A., which stated the Alien was employed there from 1981 to 1986 as an "Export Assistant" (AF 65). That letter states in part that Grendene is an injection shoe manufacturer and exporter, that the Alien's responsibilities included "commercial contact with international sales representatives, product designers, and potential customers, giving information on products, shipping, and payment terms," and that she functioned as an "international liaison between international customers, and the various departments within the company." The letter further stated that in 1985 Grendene expanded business to the Far East, and expanded its product lines by contacting electronic suppliers, including the Farbell Electronics division in Hong Kong. The letter confirmed that the Alien was involved in market research for that Far East project concerning the importation of electronic products and components, and developed proposals for new electronic products and components which Grendene would distribute. The only other past employment listed on the Alien's application was in the position of "Banking Assistant" for Lloyd's International Bank in Brazil from 1987 to 1989 (AF 1).

In its request for reconsideration, the Employer stated that this information was contained in the ETA 750B application at § 15(c), and that the letter from the Alien's former employer was provided to show "a more detailed confirmation" (AF 67). The relevant part of § 15(c) of the application states "[i]n connection with the company's venture into the electronics field, worked with prospective suppliers on new products, did market research in South America" (AF 1).

This evidence does not establish that the Alien had two years of experience in the job offered prior to being hired by the Employer. Even allowing that the letter from the former employer shows the required job skills, that letter indicates that the Alien did not have any experience in marketing electronics until 1985, and she left the firm in 1986. There is no other indication of any electronics experience on the application or in the record until the Alien began her position with the Employer in 1989. The Employer's rebuttal states "it was in the technical aspects of our electronics and telecommunications products that she received training, after joining us" (AF 56). This evidence indicates that although the Alien had five years of experience as an assistant exporter prior to being hired by the Employer, only one of those years included any experience relating to electronics exporting, and not the two years of experience in the job offered as required by the Employer. Accordingly, the Employer has failed to establish that the Alien had all of the minimum requirements prior to being hired.

Dissimilar Positions:

The Employer can also avoid a violation of § 656.21(b)(5) if it can show that the Alien gained his qualifying experience working for the Employer in a "lesser job" that is sufficiently dissimilar to the job offered. *Brent-Wood Products, Inc.*, 88-INA-259 (Feb. 28, 1989) (*en banc*).

The Employer contends that the ETA 750B application at Part 15(a) establishes two dissimilar positions (AF 67). That section of the application shows the Alien was hired in December 1989, names exactly the same duties of the job offered, and notes, "[f]irst year, as import/export assistant, acquired engineering familiarity, then promoted to marketing specialist position" (AF 1). The letter from Mr. Wells states "[t]here is no question we consider the earlier position and the current as very different, as is also substantiated by a commensurated raise in her (the Alien's) compensation from when she was originally hired" (AF 61).

The Employer, however, offers no documentation of any differences in the job duties, supervisory responsibilities, positions of the jobs within the Employer's hierarchy, whether the positions were newly created, and the actual respective salaries of each job. Mr. Wells was the supervisor of both positions, and he notes that after an unspecified period of "orientation," the Alien was "very much on her own" (AF 62). A nominal difference between two positions is not enough to establish that they are sufficiently dissimilar. *Yasufumi Enterprise Inc.*, 89-INA-357 (Mar. 28, 1991). This is especially true where the alien's duties in the first position were identical to those of the job offered. *Campfino, Inc*., 90-INA-474 (Feb. 25, 1992). See also, *Executive Protective Services, Inc.*, 92-INA-392 (July 30, 1993); *Bingo King Co.*, 91-INA-247 (Aug. 11, 1992). Accordingly, the Employer has also failed to establish that the Alien gained his experience with the Employer in a lesser, dissimilar position.

Infeasibility to Train:

Because the Employer has failed to meet its burden, it appears that the Alien was hired with less stringent requirements. Under § 656.21(b)(5), the Employer bears the burden of establishing why it is not now feasible to offer the same favorable treatment to U.S. applicants. An employer must sufficiently document a change in circumstances to demonstrate infeasibility. See *Rogue and Robelo Restaurant and Bar*, 88-INA-148 (Mar. 1, 1989) (*en banc*). The Employer's burden of establishing why it is not now feasible to offer the same favorable treatment to U.S. applicants has been characterized as heavy. *58th Street Restaurant Corp.*, 90-INA-58 (Feb. 21, 1991); *Fingers, Faces and Toes*, 90-INA-56 (Feb. 8, 1991).

Establishing infeasibility to train requires more than an assertion of growth in business or difficulty or inconvenience to the employer. *Montran Corp.*, 90-INA-300 (Jan. 8, 1992). See also, *Borrelli Bros., Inc.*, 93-INA-62 (Jan. 25, 1994); *Celini P.V.C.*, 92-INA-233 (May 28, 1993). Establishing infeasibility to train requires more than a mere showing of inefficiency. *La Barca Restaurant*, 91-INA-15 (June 8, 1992). A rare case where an employer has demonstrated the present infeasibility to train was in a situation where the employer showed that a change in its corporate ownership and a reduction in its workforce left the alien as the sole remaining employee with the knowledge and training required of an electronics engineer. *Avicom International*, 90-INA-284 (July 31, 1991).

Here, the Employer states that the Alien was trained by and reports to the Technical Marketing Specialist "who has an engineering background himself and is required to work closely with our engineers" (AF 56). The Employer contends that it is not feasible to train a U.S. worker because two engineers have left the company and reduced the total number of employees to seven (AF 56). Adrian Wells, the Technical Marketing Specialist who trained the

Alien, stated in a letter dated May 28, 1993, that the Alien "basically worked by my side with constant guidance and orientation required from me" for the first period of her employment (AF 62). Mr. Wells further stated that once the orientation had been accomplished, the Alien was "very much on her own," and Mr. Wells was free to concentrate on technical support which "had become increasingly demanding" since the loss of "several engineers involved in ongoing projects" (AF 62). The Employer contends that this loss of two engineers creates a "serious handicap" and "additional burden" on the Technical Marketing Specialist to train a U.S. worker as the Alien was trained (AF 56, 66). The Employer also contends that the reduction in staff "has come at a time when our volume of orders and pending projects is holding steady, and in fact, growing modestly" (AF 56). The Employer also notes in its request for modification that gross sales figures were $188,000 for 1990, $403,000 for 1991, and $308,000 for 1992 (AF 66).

This evidence is not sufficient to meet the Employer's heavy burden. The Technical Marketing Specialist has stated that the loss of engineers has increased the demands on his time. The Employer claims that this loss creates a serious handicap and additional burden on the company should they be required to train a U.S. worker. Assertions of difficulty or inconvenience by the Employer, however, are not sufficient to establish infeasibility to train. See *Montran Corp., supra*. Likewise, the Employer's assertion that it is experiencing a modest growth in business does not establish the infeasibility to train a U.S. worker. See *Super Seal Manufacturing Co.*, 88-INA-417 (Apr. 12, 1989) (*en banc*); *AEP Industries*, 88-INA-415 (Apr. 4, 1989) (*en banc*). This evidence fails to meet the standards for a change in circumstances sufficient to establish infeasibility. See *Avicom International, supra*.

As the Employer has failed to establish that the Alien had the qualifications for the job offered when she was hired, that she acquired the experience with a different employer, or in a lesser, dissimilar position with the same employer, and that it is infeasible to train a U.S. worker as the Alien was trained, the CO's denial must be affirmed.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 2002, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not

favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
***Washington, D.C. 20001-8002*.**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.